25

In the Supreme Court
OF THE
United States

Supreme Court, U. S.
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OCTOBER TERM, 1926.

No. [redacted] 146

HENRY WILSON, F. A. WILSON, W. T. WILSON, LUCY W. KENDALL, A. KENDALL, MARY TROWBRIDGE, Administratrix of the Estate of A. J. Patterson, Deceased, JAMES PENNYCOCK, O. BERTELSEN, J. S. HUTCHINSON, E. C. HUTCHINSON, HELENA ALLEN, A. B. JOHNSON, KATIE M. JOHNSON, MARIETT JOHNSON, A. HANSEN, CLARA A. BUCHHOLZ, H. W. JACKSON, L. EVERDING, FRANK GRAHAM, MARGARET A. WILSON, Trustee, CARRIE E. WILSON, J. H. WILSON, MARGARET A. WILSON, WM. C. WILSON, JAMES GRAHAM, B. P. NELSON, (Libelants and Cross-Respondents), KARL ROHBERG, CHARLES S. SEMSEN, JAMES HAYES, C. H. ANDERSON, HARRY WALTON, W. SARRIS, GUST ANDERSON, GUST SAARINEN, WM. R. REILLY, LOUIS NORLOFF, JOHN MCDONALD, WILSON BANGAY, ROBERT WHITE, GEORGE DOLAN, JOHN LEWIS, SETT STRAND, (Libelants),

Petitioners,

vs.

PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (Respondent, Claimant and Cross-Libelant), STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. MCKINNON, Master of said vessel,

Respondents.

Brief on Behalf of Respondents Opposing Petition for Writ of Certiorari.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
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Counsel for Respondents.

Summary of the Brief.

I.

THE BASIS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

1. It states the rule to be applied as announced by this Court in the Delaware, The New York, and The Sunnyside.

2. It recognizes that the privileged vessel should not depart from her course and speed except when she receives distinct indication that the burdened vessel is about to fail in her duty, in which event it becomes the duty of the privileged vessel herself to act to avoid immediate danger.

3. It finds that under the evidence in this case it became "distinctly apparent" to petitioner's privileged vessel, the Svea, that the burdened vessel, the Newport, was about to fail in her duty, whereupon it became the duty of the Svea to act herself to avoid disaster.

4. It holds the Svea in mutual fault for the collision with the Newport, which had admitted her fault.

II.

PETITIONER'S ATTACK ON THE DECISION.

1. It accepts the law to be applied as stated by the Circuit Court of Appeals.

2. It misstates the holding of the Circuit Court of Appeals. Petitioner says that the Court held that the

Svea was merely *in doubt* as to whether the Newport was going to fail in her duty. The Court found that under the evidence reviewed it became "distinctly apparent" to the Svea that the Newport was about to fail in her duty.

3. It admits that the case involves no unsettled question of law.

4. It relies on the suggestion that the decision sought to be reviewed is in conflict with applicable decisions of this Court and in other circuits.

5. The semblance of conflict is obtained only by the misstatement of the holding of the Circuit Court of Appeals. There is no real conflict. The Circuit Court of Appeals is in harmony with the decisions of this Court and of the other circuits.

6. Petitioner's authorities merely show that where the courts *have not found* distinct indication, the privileged vessel *has not* been condemned for holding on; just as other authorities show that where the courts *have found* distinct indication, the privileged vessel *has* been condemned.

7. This petition merely seeks to review the finding of fact of the Circuit Court of Appeals that it became "distinctly apparent" to the Svea that the Newport was about to fail in her duty.

8. The petition presents no question of public importance.

Index of Authorities Cited

Pages

Admiral Watson, The, 266 Fed. 122 ..... 6, App. iii
America, The, 92 U. S. 432, 438 ..... App. ii
Aurania and The Republic, The, 29 Fed. 98, 126, 127 ..... App. iv
Binghampton, The, 271 Fed. 69 5
Coamo, The, 280 Fed. 282 (2nd C. C. A.) 6
Cygnus, The, 142 Fed. 85 5
Delaware, The, 161 U. S. 459 ..... 2, 5
Devonian, The, 110 Fed. 588 ..... 2, 6, App. iii
Furness Withy & Co. v. Yang-Tsze Ins. Assn., 242 U. S. 430 7
George S. Tice, The, 287 Fed. 127 (2nd C. C. A.) ..... App. iii
Haida, The, 191 Fed. 623 5
Jason, The, 288 Fed. 57, 61 ..... 6, App. iv
La Lorraine, 12 Fed. (2nd) 436, 437 (2nd C. C. A.) ..... App. iii
Nautik v. Oostvoorne, 6 Lloyds List 110 6
New York, The, 175 U. S. 187 ..... 2, 3, 6, 9, App. ii
NonPareille, The, 33 Fed. 524, 526 ..... App. iv
Senator Rice, The, 223 Fed. 524 (2nd C. C. A.) ..... 6, App. iii
Southern, The, 224 Fed. 210 ..... App. iv
Sunnyside, The, 91 U. S. 208 ..... 2, 9
Tenadores, The, 298 Fed. 740 (2nd C. C. A.) 6
West Hartland, The, 2 Fed. (2nd) 834 2
Yang-Tsze Insurance Assn. v. Furness Withy & Co., 215 Fed. 859 5

Statutes Cited

26 Stat. 327 ..... Appendix

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PACIFIC MAIL STEAMSHIP COMPANY (a corporation), (Respondent, Claimant and Cross-Libelant), STEAMSHIP "NEWPORT", her engines, boilers, tackle, etc., J. MCKINNON, Master of said vessel,

Respondents.

Brief On Behalf of Respondents Opposing Petition for Writ of Certiorari.

THE BASIS OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the Circuit Court of Appeals will be found at page 239 of the Record. The reasoning is

1. That the law to be applied is that stated by this Court in the *Delaware* (161 U. S. 459), the *Sunnyside* (91 U. S. 208) and the *New York* (175 U. S. 187).

2. That under that law the privileged vessel in crossing courses should not depart from her duty to hold her course and speed in the absence of distinct indication that the burdened vessel is about to fail in her duty to keep out of the way.

3. That while holding on as required by the rule, the privileged vessel should constantly observe the burdened vessel. That the primary duty imposed upon the former to keep her course and speed does not relieve her of the responsibility of deciding if and when it may become necessary to depart from the rule in order to avoid immediate danger.*

NOTE: For brevity we refer throughout this brief to the Petition and the Brief in support thereof as the Petition.

*Citing to these requirements the *Devonian*, 110 Fed. 588 and the *West Hartland*, 2 Fed. (2nd) 834. Petition (6, 26) takes exception to the statement in the *West Hartland* that when the privileged vessel is in doubt as to the course the burdened vessel intends to pursue she should resolve that doubt in favor of safety by blowing the danger signal or taking timely steps to avoid a collision before plunging herself into a position where collision will be the natural, if not the necessary, consequence.

The *West Hartland* was under the Inland Rules, Article XVIII, Rule 3 of which provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam-whistle."

The citation of the *West Hartland* in conjunction with this Court's decisions in the *Sunnyside*, (91 U. S. 208) the *Delaware* (161 U. S.

4. That if the privileged vessel receives distinct indication that the burdened vessel is about to fail in her duty to keep out of the way, the privileged vessel should herself, in accordance with the general prudential rule,* yield her right of way if necessary to avoid immediate danger.

5. That under the evidence in this case, taking into account all the facts and circumstances, it became "distinctly apparent" that the Newport (burdened vessel) was about to fail in her duty of keeping out of the way and that the Svea (though the privileged vessel) ought not to have stood on her right of way into the collision but should have yielded to avoid that immediate danger.

6. That the Svea did not do so and was consequently in mutual fault with the Newport which had admitted her fault.

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459) and the *New York* (175 U. S. 187) followed by the statement that "the principle upon which the cases cited rest must control" (R. 243) shows that the Circuit Court of Appeals was announcing no doctrine at variance with the rule that the privileged vessel is to hold her course and speed unless and until she receives distinct indication that the burdened vessel is about to fail in her duty when she herself must act to avoid immediate danger.

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*For convenience of reference we have printed in the Appendix:

The Starboard Hand Rule (Article 19 of the International Rules),

Articles 22 and 23 defining the obligations of the burdened vessel when that rule is operative,

Article 21 defining the primary obligation of the privileged vessel to hold her course and speed.

The Note to Article 21 and the General Prudential Rule and the Rule of Good Seamanship (Articles 27 and 29). The Note both in its own text and by reference to Articles 27 and 29 indicates the circumstances under which the privileged vessel herself should act to avert collision. The General Prudential Rule particularly has been the basis for the decisions that when the privileged vessel has distinct indication that the burdened vessel is about to fail in her duty, the privileged vessel herself must act to avoid immediate danger.

That is the decision. What is

PETITIONER'S ATTACK ON THE DECISION.

Petitioner accepts the law to be applied as stated by the Circuit Court of Appeals. It says that "the leading case on the questions raised here is the Delaware" (petition 18). It recognizes that the Svea should be held at fault for maintaining course and speed if she received "some distinct indication" that the Newport was not going to give way (petition 20-21).

Petitioner then misstates the holding of the Circuit Court of Appeals. It asserts that the substance of the decision is that the privileged vessel must give way if she has *doubt* (petitioner italicizing "doubt") "in regard to the navigation of the other vessel" (petition 3). Petitioner then proceeds to demolish the misstatement—knock down its straw man. But the Circuit Court of Appeals did not put its decision upon the ground that there was *doubt* whether the Newport would give way; but upon the holding based on a review of the evidence that it became *distinctly apparent*—which of course is only another way of saying that there was *distinct indication*—that the Newport intended to persist in her course. Then, under the authorities recognized by petitioner, it became the duty of the Svea to yield to avoid immediate danger.

Accepting, as we have said, the principle to be applied as stated by the Circuit Court of Appeals from decisions of this Court, petitioner says that it is not relying for the writ "upon the proposition that there is an unsettled question of law involved in this case" (petition 8). What it relies on is a suggestion that the decision of the Circuit Court of Appeals is "in conflict with the applicable

decisions of this Court, and with the decisions in other circuits" (petition 8-9). But to get the conflict (the law being settled and accepted by the Circuit Court of Appeals as the basis of its decision) petitioner has to put up its straw man—assert that the Circuit Court of Appeals found *doubt* whether the Newport would give way whereas the finding is *in terms* that it was *distinctly apparent* that she would not.

On this finding the suggested conflict—based on misrepresentation of the Court's holding and purely fictitious—vanishes and the decision is seen to be in harmony with the decisions of this Court and of the other circuits.

All that the petition develops in its review of authorities is that, in cases where the courts found absence of distinct indication the privileged vessel has not been condemned for holding on.* In the cases where the finding

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*Thus in the *Delaware* (161 U. S. 459) there was, as petitioner says, an unanswered whistle signal from the privileged vessel but petitioner overlooks that the privileged vessel thought, and was justified in thinking, that it *had been* answered. There was also a peculiarly local factor in the *Delaware* case. The approach of the burdened vessel was across a dredged channel and if she persisted in her course she would overrun it. There was, therefore, as the court said, "every reason to suppose" that she would alter course to starboard which would be in conformity with her obligation to the privileged vessel. This factor, in conjunction with the warranted impression that the whistle *had* been answered,— both peculiar to the case—are the nub of the decision that *in that case* the privileged vessel did not have distinct indication that the burdened vessel was going to persist in her course.

That is only another way of saying that each case of course must stand on its own facts in the matter of indication.

In the *Yang-Tsze* case (215 Fed. 859-petition 21) there appeared, as petitioner says, to be a deserted bridge but that is only one of the factors in the case at bar. The privileged vessel in that case, on its own testimony departed from the rule long before it was necessary to do so to avoid immediate danger—which of course is the basis for the application of the general prudential rule.

Similarly the *Binghampton* (271 Fed. 69), the *Haida* (191 Fed. 623) and the *Cygnus* (142 Fed. 85) referred to at pages 23 and 25 of the petition hold that on *their* respective facts there was no distinct indication to the privileged vessel of the burdened vessel's approaching violation. But *their* facts are not the facts of *this* case. The same observation applies to the cases listed on page 25 of the petition.

has been the other way, as here, the privileged vessel has been condemned.* The findings of fact—was there or was there not indication—naturally differ in the various cases according to the evidence; but the decisions based on those findings are truly in accord when they apply the accepted principle to the findings.

That is precisely what the Circuit Court of Appeals did in this instance. The suggestion of a conflict with decisions in the Second or other circuits or with the decisions of this Court (petition 8, 27) thus fails. To give the suggestion even the semblance of reality petitioner, as we have observed, had to represent the opinion as holding that *doubt* as to the navigation of the burdened vessel justifies departure by the privileged vessel; whereas the holding is *indication*—"made it distinctly apparent" (R. 244).

Finally in the last paragraph of the brief in support of the petition we have the recognition that the decision sought to be reviewed is based on a finding of indication.

> "The fact that the Circuit Court of Appeals thought that the master of the Svea must have had a *clear indication* from the Newport does not change the situation" (petition 27—italics ours).

This recognition of the fundamental finding on which the decision is based should have been given, we submit, in the petition itself and at the outset of the brief (documents which are supposed to be prepared with "studied

*See for example, *The New York* (175 U. S. 187), *The Admiral Watson* (266 Fed. 122), *The Tenadores*, (298 Fed. 740; 2nd C. C. A.), *The Coamo*, (280 Fed. 282; 2nd C. C. A.), *The Jason*, (288 Fed. 57), *The Senator Rice*, (223 Fed. 524; 2nd C. C. A.), *The Devonian*, (110 Fed. 588), *Nautik v. Oostvoorne*, (6 Lloyds List 110).

accuracy"—*Furness Withy & Company v. Yang-Tsze Insurance Association,* 242 U. S. 430); instead of being grudgingly yielded in the last paragraph of the brief.

Be that as it may we have in the concluding sentence of the last paragraph, petitioner's real quarrel with the decision: that it finds "clear indication" which petitioner thinks the evidence does not warrant. That is the whole burden of petitioner's real, though not of its ostensible, argument for this writ. It is asking certiorari for review of a pure finding of fact. It is not our understanding that certiorari is granted for that purpose. The question whether under the facts of this case there was or was not distinct indication that the burdened vessel was not going to give way is of interest to the parties but not to the public. It has been decided adversely to petitioner's view but that is not proper ground for petitioner's request to have it passed upon by another court. True, petitioner seeks to give a public flavor to its plea (petition 3). But how can the question whether there was or was not distinct indication under the particular circumstances of *this case,* which may never be repeated again or never repeated in the same combination, cumulation and setting be "of national importance to the shipping community" or "of particular importance to the masters of all vessels navigating the waters of the Pacific Ocean and tributaries within the jurisdiction of the Ninth Circuit" (petition 3)? If it were, this Court would be called upon to review the particular facts of each case that arises to see whether indication or non-indication, as the case might be, had been properly found. Petitioner of course appreciates that

this cannot be so and injects into its petition the false quantity of doubt, to which we have adverted, thereby intimating that it is a misstatement of the rule which it seeks to have reviewed (and which might be of public consequence) instead of a finding of fact under a correctly stated rule.

We do not anticipate, therefore, that the Court will care to enquire into the merits of the finding. We merely refer accordingly to the evidence recited in the opinion and respectfully submit that it amply sustains the finding that it was distinctly apparent that the Newport was about to fail in her duty to keep out of the way of the Svea whereupon it became the duty of the Svea to give way herself to avoid immediate danger.

Petitioner claims that "the conclusion arrived at by the Circuit Court of Appeals should not be permitted to override" the testimony of the master of the Svea that "he thought that the Newport would change and go clear" (petition 27). But it is elementary of course that the test is objective, not subjective, and the question is not whether the circumstances of the case in fact gave distinct indication to him, that the Newport was about to fail in her duty, but whether they would have given such indication to any competent shipmaster in his situation. The reason the Svea's master "thought that the Newport would change and go clear" despite the distinct contrary indications was apparently that he had the right of way and it was the duty of the other vessel to keep out of the way (see excerpts from his testimony at page 13 of the petition and R. 213). In other words he thought the Newport

would yield because it was her duty to do so. That would excuse any shipmaster for ignoring all distinct indications that the burdened ship was not going to comply with the rule. It seems quite apparent from the master's testimony (petition 13-14) that he knew only the starboard hand rule itself—his right of way and the obligation of the Newport to keep clear of him. He seems to have been wholly unaware of the General Prudential Rule under which the privileged vessel also must act to avoid immediate danger when she has distinct indication, as the Svea had here, that the burdened ship is going to fail.

As this Court said in *The New York* (175 U. S. 187) quoting from *The Sunnyside* (91 U. S. 208):

> "Cases arise in navigation where stubborn adherence to a general rule makes a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collision, but to save life and property by preventing such disasters."

It is respectfully submitted that the application for certiorari should be denied.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Respondents.

Dated San Francisco, California,
December 24, 1926.

ENTRY OF APPEARANCE.

The undersigned hereby enter their appearance in the above entitled court as counsel for respondents.

EDWARD J. MCCUTCHEN,
WARREN OLNEY, JR.,
FARNHAM P. GRIFFITHS,
Counsel for Respondents.

ADMISSION OF SERVICE.

Due service and receipt of a copy of the within brief is hereby admitted this.....day of....., 1926.

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Counsel for Petitioner.

(APPENDIX FOLLOWS.)

Appendix.

ARTICLES OF THE INTERNATIONAL RULES INVOLVED IN THIS CASE.

Article 19—Starboard Hand Rule

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." (26 Stat. 327.)

Article 22—

"Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other." (26 Stat. 327.)

Article 23—

"Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." (26 Stat. 327.)

Article 21—

"Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed." (26 Stat. 327.)

Note to Article 21—

"When, in consequence of thick weather or other causes, such vessel finds herself so close that collision can not be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision." (See Arts. twenty-seven and twenty-nine.) (26 Stat. 327.)

Article 27—General Prudential Rule

> "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." (26 Stat. 327.)

Article 29—Rule of Good Seamanship

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (26 Stat. 327.)

The Courts are therefore constantly cautioning that no vessel has a right of way to run into disaster.

> "Rules of navigation are ordained to preserve life and property and not to permit or authorize collision. Even flagrant fault committed by one of two vessels approaching each other from opposite directions, will not excuse the other from adopting every proper precaution to prevent a collision."
>
> *The America,* 92 U. S. 432, 438.

> "As was said in the case of the Sunnyside, 91 U. S. 208, 222: 'Cases arise in navigation where stubborn adherence to a general rule makes a culpable fault, for the reason that every navigator ought to know that rules of navigation are ordained, not to promote collision, but to save life and property by preventing such disasters.' "
>
> *The New York,* 175 U. S. 187.

> "No code of navigation gives leave to run into collision; the saving rule of special circumstances

flavors every other rule with the salt of precaution and common sense."

La Lorraine, 12 Fed. (2nd) 436, 437 (2nd C. C. A.).

"The primary purpose of rules of navigation as said by the Supreme Court, is not to fix arbitrary rights of the road to vessels, but rather for the safety of life and property."

The Admiral Watson, 266 Fed. 122.

"But over and underlying all the rules of navigation is that rule of common sense, so often referred to, that no one has the right to run into collision."

The George S. Tice, 287 Fed. 127 (2nd C. C. A.),

"Where property and life are at stake, neither party should insist upon persisting in a course which is likely to result in disaster, when the delay of a few minutes will insure the safety of both."

The Senator Rice, 223 Fed. 524 (2nd C. C. A.).

"But the privileged vessel is to hold her course, constantly observing the burdened vessel in order to note if the latter fails in her duty. When the failure of the burdened vessel becomes apparent, the privileged vessel must change her course, as prudence commands."

The Devonian, 110 Fed. 588.

"No privilege exempts a vessel from using ordinary common sense to escape from danger."

The Southern, 224 Fed. 210.

"As was held in the John H. Starin, 162 Fed. 146, 89 C. C. A. 170, there is no right of way on which a

vessel is entitled to insist, when it is obvious that it will result in collision."

The Jason, 288 Fed. 57, 61.

"There is no such thing as a 'right of way' to run into unnecessary collision. The rules of navigation are for the purpose of avoiding collision; not to justify either vessel incurring a collision unnecessarily. The supreme duty is to keep out of collision."

The Non Pareille, 33 Fed. 524, 526.

"Whenever danger of collision has become manifest, and the vessel previously bound to avoid it is plainly neglecting her duty to do so, the circumstances are special, and the other vessel must do what she can to prevent disaster. If this rule were not acted on and rigidly enforced, disastrous collisions would arise daily, and the lives and property of innocent persons be sacrificed to a tenacious adherence to the mere right of way; * * *."

The Aurania and The Republic, 29 Fed. 98, 126, 127.

end